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Supreme Court of the United States

October Term, 1965

No. 375

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee

On Appeal from the United States District Court for the Middle District of Pennsylvania.

REPLY TO MOTION TO AFFIRM

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REPLY TO MOTION TO AFFIRM

I. APPELLEE CONFUSES "POWER" WITH "MANNER OF EXERCISE"

Appellee's basic misconception of our argument is that we deny the power to Congress to supersede State regulation. The Court below also misconstrued our position as evidenced by their footnote 3 (J.S. 33) where they shudder to think of the chaos that would result if each state could block the interstate discontinuance.

Before the Transportation Act of 1958 the Railroad had no method of going to the I.C.C. for the discontinuance

of an interstate line. If the train stopped two or more times in any one State, the Railroad had to apply to the particular State for permission to discontinue the line as to the stops within the State, if the State had such regulations. Before 1958, the Interstate Commerce Commission only had jurisdiction over "abandonments" which covered both passenger and freight service served by a train. Where only passenger service was discontinued, no I.C.C. approval was necessary.

The "chaos" that the Court below refers to that would result if the P.U.C.'s position was right, is the "chaos" that has been in existence from 1789 until 1958. Up till that time each state had the right to prevent the discontinuance of a train if it made more than one stop in the state so far as the station stops in that State were concerned.

In 1958, the Federal Government passed the Federal Transportation Act and sought to supersede state action by making it unnecessary for the Railroad to comply with State law if it followed the procedures set forth in §13a(1).

We have no quarrel with the "power" of the Federal Government to supersede State power. What we quarrel with by the Act is whether Congress has exercised its power in the manner required by the Constitution. **Has Congress determined itself or through its agency that state power over intrastate commerce in all cases is necessary to be superseded?**

This is the teaching of the *Shreveport* case and the many others following in its wake, including *Texas v. Eastern Texas R.R.*, 258 U.S. 204.

Appellee in footnote 6 claims that we have mistakenly relied upon the *Texas* case. Appellee states that in the

Texas case "*some* interstate traffic moved over the intrastate lines." This is a misquote. On page 214 of the Opinion, Mr. Justice Van Devanter states "Approximately three fourths of the traffic over the road is in interstate and foreign commerce and the rest is in intrastate commerce." Appellee then makes the nonsensical statement that "Once a railroad had been authorized to abandon the carriage of interstate traffic the remaining intrastate operations were not related in any way to intrastate commerce." Once any railroad abandons its interstate traffic, the remaining intrastate traffic, naturally, stands alone. The interstate traffic is gone; there can be no relation to it any more.

Appellee states that the "doubts" in the *Texas* case relate to abandonment of intrastate operations by a railroad which carries no interstate traffic and conducts no interstate transportation operations of any kind (Motion To Affirm, P. 7, fn 6). This statement is contrary to the facts as noted in the Opinion.

The decision of the United States Supreme Court in the *Texas* case is clear and simple. There, a railroad was engaged both in inter and intrastate commerce. The I.C.C. authorized abandonment of the line. The State of Texas thought that the I.C.C. had authorized abandonment of the intra as well as the interstate operations of the train. It therefore brought suit in the Federal Court to enjoin the railroad from discontinuing intrastate operations. The Federal Court dismissed the suit on the ground that the railroad had a right to discontinue intrastate operations based upon the I.C.C. certificate. The U.S. Supreme Court reversed, holding that the I.C.C. did not intend to cover the intrastate operations but only interstate operations, so that the railroad had to continue

operating in intrastate commerce. It said that the District Court had given the I.C.C. certificates a wider operation and effect than should be given to them. By thus delimiting the operation and effect of the I.C.C. certificate "a serious question" as the constitutional validity of the Transportation Act of 1920 was avoided.

Unfortunately, the doctrine of two constructions cannot intervene to save the present act from its constitutional collision. As indicated by Justice Van Devanter in the *Texas* case, the power to regulate intrastate commerce arises "only as that may be incidental to the effective regulation and protection of commerce of the other class [interstate commerce]." 258 U.S. at p. 217.

The Court in the *Texas* case noted that:

> "Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." 258 U.S. at pp. 216-217.

The necessary nexus that must exist before State supersession can take place is also evidenced by *Colorado vs. U.S.*, 271 U.S. 153.

In the *Colorado* case, the I.C.C. had found that the branch line that was operating both in intrastate and interstate commerce was a part of the system, that "for years operation of the branch had resulted in large defi-

cits;" that "future operation would likewise result in large deficits"; "that the operating results of the branch are reflected in the Company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus **continued operation would constitute an undue burden upon interstate commerce.** Abandonment of Branch Line by Colorado & Southern Ry., 72 I.C.C. 315; 82 I.C.C. 310; 86 I.C.C. 393." 271 U.S. at p. 160.

If the **same type of findings** had been made in this case we would not be here. In that case the State of Colorado attacked the power of the I.C.C. The Supreme Court held that Congress has the power "to protect interstate commerce from undue burdens or discrimination." 271 U. S. 162.

The Court said:

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over **intrastate** commerce **only because** such control is a necessary incident of freeing interstate commerce from the **unreasonable burdens**, obstructions or unjust discrimination which are found to result from operating a branch at a large loss. . . .

"The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce **is similar** to that exerted when a State establishes **intrastate rates** so low that intrastate traffic does not bear its fair share of the cost of the service. (cases cited.) . . .

"The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in The Shreveport case, 234 U. S. 342, a power to pre-

vent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce."

"Each element essential to the exercise of that power" by the Commission or Congress must therefore appear. *N. C. v. U. S.*, 325 U. S. 507, 511.

Appellee misstates our argument that Congress cannot pass a statute regulating intrastate activities that affect interstate commerce. We make no such argument. However, Congress has not assumed the regulation of all intrastate railroad transportation by an interstate railroad. If it did, the Act would be similar to that in *U. S. v. Darby*, 312 U. S. 100 or *Wickard v. Filburn*, 317 U. S. 111, and the inquiry would be whether such all-inclusive regulation was reasonably necessary for the protection of interstate commerce.

But Congress has not seen fit to do that. Rather, Congress has left the matter of railroad discontinuance to a case by case basis when a railroad applies, in which case the I.C.C. may or may not suspend, and, after hearings, even require the continued operation of the line. There is therefore no all-inclusive regulation here, but rather one based upon the procedure taken in a case by case method.

What we are quarrelling with here is the procedure as exercised in this particular case. The *Colorado* case makes it clear that Congress' power in this area follows the *Shreveport* decision, that is, there must be a relationship to interstate commerce. Congress or its agency must determine so long as a case by case method is employed whether there is any adverse effect on interstate commerce if the interstate operation is continued.

(1) Appellee's Play on Words as to the Colorado Case

Since only under certain conditions can State power be superseded, those conditions must appear. As was said in *P.S.C. of Utah v. U. S.*, 356 U. S. 421, 425, the justification must clearly appear.

Appellee attempts to use the *Colorado* case to argue that jurisdictional findings are not necessary. How it concludes this from the *Colorado* case is a play upon words. In the *Colorado* case the State was arguing that certain types of findings should have been made, namely:

> (1) that by continued operation of the branch interstate or foreign commerce will be discriminated against, or
>
> (2) that the Company will be prevented from earning a fair return on the value of its properties as a whole, or
>
> (3) that the entire intrastate business in Colorado will not earn such a return upon the property used in conducting that business.

The Court said that the I.C.C. did not have to make findings in order to make its decision so long as it made a **finding** that the "abandonment be consistent with public necessity and convenience." The Court then went on to say:

> "In determining whether it is, the Commission must have **regard** to the needs of both intrastate and interstate commerce. . .
>
> "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which

the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. [Citation omitted.] The result of this weighing—the judgment of the Commission—**is expressed by** its order granting or denying the certificate."

The Appellee therefore attempts to argue that when the Court said that the particular findings as phrased by the State did not have to be made, as such, it was saying that no findings had to be made. Nothing could be further from the truth. Findings have to be made to justify the conclusion that public convenience and necessity require the abandonment. In fact, the Court said,

> ". . . the fact of demonstrated prejudice to interstate commerce and the absence of earnings to afford reasonable compensation are, of course, **relevant and may often be controlling.** But the Act does not make issuance of the certificate dependent upon a specific finding to that effect."

All these factors therefore have to be considered and the Commission is charged with making an ultimate finding as to what public convenience requires after **considering** all these things. And that finding must be supported by the evidence. In fact, in that case, the Court said:

> "An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was **ample evidence** to support the **facts found.** . . ." (Emphasis supplied.)

In the *Colorado* case you therefore have a case where full hearings were afforded, full findings made as to the

effect the intrastate operations would have on the interstate operation, all leading to an ultimate finding, supported by evidence, that public convenience required the abandonment.

How can that case be cited by appellee to support its position here that a hearing does not have to be held, that **no findings** have to be made, that nothing has to be considered, and that the filing of its application to abandon is all that has to be done to make the abandonment proper and consistent with the Constitutional division of power between the Federal Government and the states?

If the procedure in the *Colorado* case had been followed here we would not be in court.

When appellee says that "The opinion makes it plain that findings were not a matter of constitutional necessity . . ." appellee shows a lack of careful reading. In that case the Supreme Court specifically said: "The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the Shreveport case, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce." Findings must be made to establish this jurisdictional or constitutional basis before state power is overridden. While certain findings in the *Colorado* case did not have to be made, as **phrased** by the State, this is far from saying, as appellee does, that **no** findings have to be made. A careful reading of the case will show it does not stand for that proposition.

The *Texas* case and the *Colorado* case can be very easily harmonized. In fact, they were both decided under the same Federal statute, the Transportation Act of 1920.

Where Congress attempts to supersede state power over intrastate commerce without making some finding that such action is necessary to promote or protect interstate commerce (in whatever form of words the finding may take), Congress is going beyond its power. *Texas v. Eastern Texas R.R. Co.*, 258 U. S. 204. Where Congress does find, based upon evidence, that the intrastate operations of a railroad burden its interstate operations, Congress can exercise the **power** which it has to supersede state control. *Colorado v. U. S.*, 271 U. S. 153.

The *Colorado* case is an example of the proper exercise of Federal power, where hearings were had, evidence adduced, findings made, and the conclusion reached that public convenience required the abandonment. In this case none of that was done.

The *Colorado* case cannot be used to justify the exertion of Federal power here in superseding state action where the method was entirely different.

Appellee also relies upon *Katzenbach v. McClung*, 379 U. S. 294, for the proposition that findings are not required on a case by case basis. That case involved the Civil Rights Act as applied to a local restaurant serving interstate travelers. In that case Congress passed the law as to all such restaurants. The only function for the Court to perform was to determine whether a restaurant came within the definition and within the Act. In the present case not all intrastate trains are declared to be a burden on interstate commerce. Each case must be dealt with on its facts. In the *Katzenbach* case the Court found that the legislators in light of the facts and testimony before them had a rational basis for setting up the regulatory scheme involved. In the *Katzenbach* case the absence of findings

in the statute was not crucial since "the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate."

There is, as pointed out, a very distinct difference between that case and the case at bar. In *Katzenbach*, Congress was saying that **all** restaurants which serve interstate travelers or serve food a substantial portion of which has moved in interstate commerce **is bound by the act not to discriminate.** Congress could do this based upon the evidence before it.

In the Act under question, there is no attempt to subject all of the interstate trains serving intrastate commerce as well to automatic discontinuance. If the Act read that way, then the Court would have a different question. In this case, however, Congress, has not so said. Whether an intrastate operation is to be discontinued along with the interstate operation is a matter left to be determined on a case-by-case basis. The I.C.C. for example can decide that in any given case under 13a(1), the line should continue to operate because there is no burden on interstate commerce. We therefore do not have the sweeping situation present in *Katzenbach* and *Wickard v. Filburn* or *U. S. v. Darby.*

We are therefore not arguing that Congress should set up a case by case determination for the discontinuance. Congress has already set it up that way. **But what Congress did not provide for, to which we object, is the manner or method by which State power is to be superseded, the normal way being by hearings and a finding,** as in the *Colorado* case.

We therefore submit that the Act in question is unconstitutional, not because of the lack of power in Con-

gress, but the manner in which that power is sought to be exercised.

II. RES JUDICATA AND FULL FAITH AND CREDIT

Appellee claims that *Kalb v. Feuerstein* and *U. S. v. U. S. Fidelity Co.* control on the issue of full faith and credit and *res judicata*. In *Kalb* the Federal questions would not have been preserved for review in the Supreme Court since once the bankruptcy court took jurisdiction the State court lost it and the Supreme Court, as well as the State court, on its own motion, could dismiss the case for lack of jurisdiction. The Federal questions were therefore not to be preserved by appealing through the State courts. The same thing can be said in *U. S. v. U. S. F. & G. Co.*, 309 U. S. 506, where the State court would have had to dismiss the action or your Honorable Court would have had to dismiss same for lack of jurisdiction, since exclusive jurisdiction lay only in the Federal District Court situated in the Indian reservation.

But not so in this case. The Federal questions are fully preserved in the State litigation and could be preserved on up to your Honorable Court. There is an appropriate avenue through the State courts in this case not available in the other cases cited. Whether an Act of Congress is constitutional can be decided by the State courts and review preserved in your Honorable Court just as well by appeal through the State courts as a suit originating in the Federal court. The Federal court is not the exclusive guardian and protector of the Constitu-

tion. State courts are equal partners in this pursuit. For this purpose a State court is an intermediate tribunal acting under the Supreme Court of the United States.

Appellee therefore by waiving its right to prosecute its appeal through to the State courts has lost its right to relitigate the matter anew in the Federal courts.

CONCLUSION

The questions presented are substantial and require plenary consideration. Probable jurisdiction should be noted.

Respectfully submitted,
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